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IN THE

Supreme Court of the United States

October Term, 19

No. 74-500

REMSCO ASSOCIATES INCORPORATED,
a New Jersey Corporation,
Petitioner,

v.

BEAVER FALLS MUNICIPAL AUTHORITY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petition for Writ of Certiorari

Petitioner Remsco Associates, Incorporated, a New Jersey Corporation prays that a Writ of Certiorari issue to review the decrees of the Supreme Court of Pennsylvania dated May 13, 1974 and July 30, 1974.

A. Opinions Below

The opinion of the Court of Common Pleas of Beaver County of May 7, 1973 is set forth in the Record. No Opinions were filed by the Superior or Supreme Courts of Pennsylvania.

B. Jurisdiction

The date of the Decree appealed from is July 30, 1974 in the Pennsylvania Supreme Court. Jurisdiction of this Court is invoked under 28 USCA § 1331, 1332.

C. Questions for Review

Where diversity and jurisdictional requisites of Federal jurisdiction are present in a matter touching upon commerce are State Courts bound to apply the Federal Arbitration Act in ruling upon a Petition to modify an award of a Board of Arbitrators?

Where State Appellate Courts by successive *per curiam* orders fail to recognize on the Record the Federal question stated above and fail to allow *nunc pro tunc* a Petition for Reconsideration of said Federal question, does the United States Supreme Court have jurisdiction to order reconsideration of the Federal Question?

D. Constitutional Provisions and Statutes Involved

Federal Arbitration Act 9 USCA § 1 *et seq.*

E. Statement of Case

This appeal arises out of a municipal waste plant construction contract executed on September 28, 1967, between appellant and appellee for mechanical work of the value of $786,200.00. Remsco thereafter claimed damages in the nature of increased costs and loss of efficiency of the owner for a completion overrun of 273 days. The matter was submitted to a Board of Arbitrators which filed an award in favour of Remsco in the amount of $32,000.00 plus interest on September 7, 1972. The Court of Common Pleas of Beaver County, Pennsylvania, granted owners petitions to

modify by an order dated May 7, 1973, which struck the award of damages of $32,000.00 "on the ground that the majority of the arbitrators made an error in law in awarding damages of the plaintiff." Thereafter Remsco filed its appeal with the Pennsylvania Superior Court on June 19, 1973. This appeal stated, *inter alia*, the following query:

> 1. Q. Where parties to arbitration are from Pennsylvania and New Jersey, concerning a contract in amount of $786,200.00, upon which an arbitrators award issued in the amount of $32,000.00 does the Superior Court have jurisdiction to apply Federal Law in determining whether the award may be modified?
> A. Yes.

Appellant's brief assigned as error the failure of the Court of Common Pleas of Beaver County its failure to follow the Federal Arbitrators Act 9 USCA § 1, 2, 10, 11 which does not allow modification for errors in law. § 10, 11. On December 1973, at 394 April Terms, 1973, the Superior Court denied, *per curiam*, Remsco's appeal, filing no opinion. On January 29, 1974, Remsco filed a petition for allowance of appeal with the Supreme Court of Pennsylvania at No. 534 Allocatur Docket, and on May 13, 1974, the order "Petition Denied, Per Curiam" was filed. No opinion was filed. On January 17, 1974, Remsco filed with the Pennsylvania Supreme Court, a Petition to file, *nunc pro tunc* a Petition for Reconsideration of denied of allocatur filed. This petition was denied *per curiam* on July 30, 1974. No opinion was filed.

F. Raising of Federal Question

The Federal Question herein was raised on Appeal to the Pennsylvania Superior Court of the Order of May 7, 1973 of the Court of Common Pleas, Beaver County, Pennsylvania. See Statement of Case, above.

G. Reasons for Granting the Writ

The Pennsylvania Supreme Court has misconstrued the Federal Rules and Federal Arbitration Act by failing to reconsider the confirmation of an Order striking an Arbitrators Award which was subject to Federal jurisdiction and which was struck contrary to the terms of the Federal Arbitration Act.

> The Federal Arbitration Act 9 USCA § 2 declares itself to be applicable to "a contract evidencing a transaction involving commerce" by declaring that "a written provision . . . to settle by arbitration" a controversy arising from such a contract shall be "valid, irrevocable and enforceable".

The Act in § 1 thereof states " 'commerce' as herein defined, means, commerce among the several states . . ."

This Act has been held to create a body of "national substantive law":

> *Robert Lawrence Co. vs. Devonshire Fabrics, Inc.*, 271 F2d 402 (C.A. 2, 1959) at p. 409.

In the Federal Court system, jurisdiction has been assumed upon findings of diversity of citizenship, jurisdictional amount, and a contract evidencing a transaction involving commerce.

> *John Monte Company vs. Southern Delaware County Authority*, 321 F2d 870 (1963) p. 874.

In the instant case, diversity is present (R. 6a, 7a), as is the jurisdictional amount *i.e.* $32,000.00.

Federal Courts have decided the "commerce" question where there is a showing of substantial movement of services or goods across a state line.

Prima Paint Corp. vs. Flood & Conklin Mfg. Co., C.A. N. Y. 1966, 360 F 2d 315, Aff'd 87 S. Ct. 1801, 388 US 395, 18 L. Ed. 2d 1270.

Monte vs. Delaware, supra.

Galt vs. Libby Owens Ford Glass Co., C.A. Ill 1967, 376 F2d 711 at pp. 713-714.

In the instant case Remsco's contract with the Authority was for $786,200.00 worth of mechanical work. Contract Paragraph 6-E. Items were purchased by Remsco in New Jersey for delivery to the job site in Pennsylvania (18a-22a, 25a-26a, 26a-28a, 35a-37a). Edward Schuman for Remsco testified at the pages above to lump sum values of equipment purchased for the job as follows: culorination equipment: $37,500.00, chemical storage and feed: $50,600.00, flocculation and sludge equipment: $79,000.00, mixers $10,000.00; filter sand : d gravel: $52,000.00, pump and pumping equipment $55,500.00, iron pipe valve and sluice gates: $199,000.00, butterfly valves: $183,000.00. The labor was necessarily purchased in Pennsylvania by Remsco from its New Jersey Office. Therefore, under the *Prima Paint* and *Monte* cases above it is apparent that the dispute in question had sufficient contacts with "commerce" as defined, to provide the necessary jurisdictional element for application of the Federal Arbitration Act.

Now the question arises: should, must a Pennsylvania Appellate Court apply the Federal Law as outlined above to a matter previously decided exclusively under Pennsylvania law?

Petitioners affirm this query, primarily because of the wide range given to Federal Law in matters legislated on the United States Congress touching powers vested in Congress under the commerce clause. While separate

agencies and courts have been largely responsible for administering this corpus of Federal Regulation, petitioner can discover no authority which dictates that Pennsylvania Appellate Courts cannot apply Federal Law. To explore all the various areas in which State Courts do apply peculiarily Federal Law would unnecessarily lengthen this brief: suffice it to quote Pennsylvania Legal Encylopedia, § 83 Courts:

> On the other hand, the United States Supreme Court is the final arbiter with respect to federal questions, and state courts are bound to follow its decision. *For example, the Pennsylvania courts are controlled by decisions of the United States Supreme Court on matters affecting interstate commerce.* State courts are bound to conform their decisions to those of the Supreme Court of the United States on all questions involving the construction of the United States Constitution and United States statutes. (Emphasis supplied)

See also Litton RCS Inc. v. Pennsylvania Turnpike Commission, 376 F Supp. 579 (1974) at pp. 585, 586.

Proceeding from the conclusion that Federal Law is applicable to matters touching commerce, and adverting to the definition of commerce set forth above, the question then comes, what is the applicable substantive Federal Law, does it conflict with State Law, and, which if either, must yield?

The Court of Common Pleas struck Remsco's $32,000.00 award upon the following basis:

> "For these reasons, we are of the opinion that the plaintiff's sole remedy under its contract with the defendant for the delays in construction encountered on this project was to obtain an extension of time. For this reason, we are of the opinion that the majority of the arbitrators made an error in law in awarding damages to the plaintiff." (Opinion p. 40).

Thus an initial query is, assuming *arguendo* that the Arbitrators committed an error in law, is that grounds for modifications under the Federal Arbitrators Act? The answer is no. First, § 10 and 11 of that Act fail to allow for modification of award or a mistake in law. By enumerating, fraud, partiality, misconduct in § 10 and miscalculation, lack of submission, and imperfections of form is § 11, mistakes of law are excluded as a basis for modification.

Secondly, the Federal decisions on the matter reach a similar result. While an arbitrators award may be overturned for a manifest disregard of law or misbehavior of arbitrator (*Trafalgar Shipping Co. vs. International Mill Co.*, C.A.N.Y. 1968, 401 F 2d 568), a mistake of law is insufficient to warrant modification or vacations under 9 USCA § 10 or 11

> *Marcy Lee Mfg. Co. vs. Cortley Fabrics Co.*, C.A.N.Y. , 5, 354 F 2d 42.
>
> *Amicria Society Navegazione vs. Chilean Nitrate & Ludine Sales Corp.*, C.A.N.Y. 1960, 274 F 2d 805, cert. den. 80 S. Ct. 1612, 363 US 843, 4 L. Ed. 2d 1727.

On the other hand, the Court below ruled upon the Pennsylvania Arbitration Act 5 P. S. § 171, *et seq.* which provides that an award against the law sufficient to warrant a judgment *N. O. V.* or a jury verdict may be modified by the Court.

While no case precisely on the point raised by this appeal has been found, the momentum of the plenary exercise of Federal powers under the commerce clause has been held to have supremacy over state law. Thus in interpreting a "transaction involving commerce" the Sixth Circuit Court of Appeals stated that "Kentucky law and policy must yield to paramount Federal law . . ." (*American Airlines Inc. vs. Louisville*, 269 F2d 811, p. 17).

While the above could be regarded as obiter since the Court appeared to reach its decision based on interpretations of Kentucky Law, the Seventh Circuit clearly ruled that the Federal Act applied to a diversity action involving a dispute arising in Illinois. In this case the District Court had granted a preliminary injunction to stay arbitration under the Illinois Arbitration Act in the face of a contractual agreement to arbitrate. The Circuit Court ruled the injunction under the Illinois Act to be unwarranted interference with the Federal Act. *Gall vs. Libby Owens Ford Glass Co.*, 376 F 2d 711 (1967).

These decisions bring us full circle to those cited in P.L.E. § 83 Courts which state that Pennsylvania Courts are controlled by decisions of the United States Supreme Court on matters touching commerce.

Thus it appears that petitioner was entitled to the award of the Arbitrators free from any modification for legal error, assuming one existed.

On this ground alone, the Order of the Court below should have been reversed on this ground lies the federal question should not the Pennsylvania Appellate Courts have taken cognizance of the apparent disparity between Federal Arbitri Law and the opinion of the Court of Common Pleas of Beaver County.

Therefore the Federal Question recited in (e) above was properly raised before the Pennsylvania Superior Court in the form given in (e) above, and again before the Pennsylvania Supreme Court via its review of Appellant's Briefs pursuant to Rule 62 of the Pennsylvania Supreme Court under which copies of briefs submitted to the Superior Court were furnished with the Petition for allowance of appeal. The same question was raised in petitioner's Petition for Oral Argument in Paragraph B, E and F.

That, under *Robert Lawrence Co., supra,* the State Courts are bound to apply the Federal Arbitration Act would seem to be beyond question. Petitioner therefore assigns as cause for the granting of this Petition that:

1. The *per curiam* decisions of the Pennsylvania Appellate Courts fail to even assay the Federal Question.
2. The result reached operates to violate the Federal Arbitration Act by allowing the award—which touches commerce—to be nullified by a finding of error of law.
3. That the hearing and disposition of that Federal Question is mandated by the strong Federal policy established by the Federal Policy established by the Federal Arbitration Act so that a reconsideration of the Appeal of Remsco to the Pennsylvania Supreme Court should be ordered.

Respectfully submitted,

REX DOWNIE, JR.,
Attorney for Appellee.

APPENDIX A

Petition for Allowance of Appeal Pursuant to Rule 62

(Filed Supreme Court, Western District, Pennsylvania Jan. 29, 1974.)

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

REMSCO ASSOCIATES INCORPORATED,
a New Jersey Corporation,

Appellant,

vs

BEAVER FALLS MUNICIPAL AUTHORITY,

Appellee.

No. 534 Allocatur Docket.

Superior Court No. 394 April 1973.

To the Honorable the Justices of said Court:

Now COMES Rex Downie, Jr., Esq., Counsel for Remsco Associates Incorporated and brings the following Petition for Appeal on grounds set forth as follows:

1. Petitioner is Remsco Associates Incorporated, a New Jersey Corporation.

2. On the 3rd of January, 1974 the Superior Court of Pennsylvania affirmed per curiam the Order of the Court

of Common Pleas of Beaver County, Pennsylvania dated May 8, 1973 which modified the Arbitrators Award in favor of Remsco Associates in the amount of $32,000.00 Dollars by striking therefrom said Award of $32,000.00 Dollars.

3. This Petition is prayed for by reason of the following particular arguments:

a. That the opinion of the learned lower Court and its affirmation by the Superior Court is contrary to decided case law of the Commonwealth of Pennsylvania as handed down by Your Honorable Court: Gasparini Excavating Company, Appellant v. Pennsylvania Turnpike Commission, 409 Pa. 465 (1963); Henry Shenk Co. vs. Erie Co., 319 Pa. 100 (1935); McDevitt v. McDevitt, 356 Pa. 18 (1950) and Pennsylvania Turnpike Commission v. Smith, 350 Pa. 355 (1944).

b. That the Opinion of the lower Court as affirmed fails to properly construct the construction contract entered into between the parties in this litigation in that the learned lower Court has ruled that Appellant is by law prevented from claiming damages for delay of construction even though the same Contract allows for claiming of liquidated damages on the part of the owner Appellee and said owner Appellee did in fact claim liquidated damages in the Arbitration Hearing.

c. That the learned lower Court in its Opinion as affirmed by the Superior Court made a finding of fact as to foreseeability of delay whereas the Arbitration Act of 1927 allows for modification of an Award only for a manifest errors of law and reposes findings of fact in the discretion of the Arbitrators.

d. That the learned lower Court as affirmed by the Superior Court failed to properly construct the construction contract in that they had applied the rule of the Henry Shenk Co. vs. Erie Co., 319 Pa. 100 (1935) despite the fact that the contract in the Shenk case is clearly different than the one in the instant case and that the Shenk case is clearly distinguishable upon its factual basis from the case at hand.

e. That the Superior Court failed to consider the provisions of Federal Law and the Federal Arbitration Act in ruling upon the decision of the lower Court.

f. That the learned lower Court as affirmed by the Superior Court erroneously held that Appellant is bound by law to anticipate the failure of the owner to prosecute the work so as to bring it to timely completion.

WHEREFORE, your petitioner prays Your Honorable Court to grant this Petition for Appeal.

Respectfully submitted,

REX DOWNIE, JR., ESQ.,
Attorney for Appellant.

Appendix A—Petition for Allowance of Appeal Pursuant to Rule 62

No. 1019

IN THE

SUPERIOR COURT OF PENNSYLVANIA

REMSCO ASSOCIATES INCORPORATED,
a New Jersey Corporation,
Appellant

vs.

BEAVER FALLS MUNICIPAL AUTHORITY.

No. 394 April Term, 1973.

Appeal from the Order of the Court of Common Pleas, Civil Action, Law, of Beaver County, at No. 154 of 1970.

Per Curiam Filed: January 3, 1974.

Order affirmed.

APPENDIX B

Petition Under Rule 62 for Leave to File, *Nunc Pro Tunc*, a Petition for Reconsideration of Denial of Allocatur

(Filed—Supreme Court Western District, Pennsylvania June 17, 1974.)

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

REMSCO ASSOCIATES INCORPORATED, a New Jersey Corporation,

Appellant,

vs.

BEAVER FALLS MUNICIPAL AUTHORITY,

Appellee.

No. 534 Allocatur Docket.

To the Honorable the Judges of said Court:

Now COMES Rex Downie, Jr., Esq., counsel for Remsco Associates Incorporated and brings the following Petition:

1. That subsequent to the ruling of Your Honorable Court on May 13, 1974 it was necessary for local counsel, Rex Downie, Jr., Esq., to proceed to the City of New York to meet with the Officers of Remsco Associates Incorporated and their Corporate counsel in the Offices of Attorney Max

Appendix B—Petition Under Rule 62 for Leave to File, Nunc Pro Tunc, a Petition for Reconsideration of Denial of Allocatur

Greenburg of 100 Church Street, New York, N.Y. to consider and consult concerning further handling of the above captioned matter.

2. That Attorney Rex Downie, Jr., Esq., proceeded to New York on May 30, 1974 as that was the earliest date at which it was possible to consult with the Corporate Officers of Remsco together with their New York Attorney who was involved in trial prior to that date.

3. That the copy of Your Honorable Court's Order of May 13, 1974 was transmitted to Rex Downie, Jr., Esq., by regular mail and was not received by him in Beaver Falls, Pennsylvania until on or about the 16th day of May, 1974.

4. That a Petition for Reconsideration on the above Appeal was filed with Your Honorable Court under date of June 5, 1974.

5. Your Petitioner annexes hereto a Petition for Reconsideration and avers that the reasons assigned for Reconsideration are of sufficient import as to be persuasive for the Allowance of this Petition *Nunc Pro Tunc.*

Respectfully submitted,

REX DOWNIE, JR., ESQ.,
Attorney for Appellant.

Appendix B—Petition Under Rule 62 for Leave to File, Nunc Pro Tunc, a Petition for Reconsideration of Denial of Allocatur

AFFIDAVIT.

Commonwealth of Pennsylvania,
County of Beaver. } ss.:

Before me, a Notary Public, personally appeared Rex Downie, Jr., Esq., who being duly sworn according to law does depose and say that the facts set forth in the foregoing Petition are true and correct to the best of his knowledge, information and belief.

REX DOWNIE, JR., ESQ.

Sworn to and subscribed before me this 11th day of June, 1974.

VIRGINIA WOLFE,
Notary Public,
Beaver Falls, Beaver Co., Pa.,
My Commission Expires July 19, 1976.

APPENDIX C

Order of July 30, 1974

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

REMSCO ASSOCIATES INCORPORATED,
a New Jersey Corporation,

Appellant,

VS.

BEAVER FALLS MUNICIPAL AUTHORITY,

No. 534 Allocatur Docket.

Petition for Allowance of Appeal.

CERTIFIED FROM THE RECORD.

January 29, 1974, Petition of Remsco Associates Incorporated from an Order of the Superior Court at No. 394 April Term, 1973, filed.

ORDER.

May 13, 1974, Petition Denied.

PER CURIAM.

Appendix C—Order of July 30, 1974

June 17, 1974, Petition for leave to file, *nunc pro tunc*, a Petition for Reconsideration of denial of allocatur filed.

ORDER.

July 30, 1974, Petition denied.

PER CURIAM.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court at Pittsburgh, Pa. this 12th day of August 1974.

SALLY MRVOS,
Prothonotary.

APPENDIX D

Excerpts of the Transcript of Testimony of Edward Schumann

* * *

The Witness: These are best described in the bidding documents found on page 6c of the documents. And there are nine bid items. The engineers chose to bid the job broken down in this fashion.

Maybe it would be in order for me to recite where these major items were installed.

Mr. McClain: Are these to which you are referring in the possession of the Arbitrators?

The Witness: Yes.

Should I stick a dollar value on these things? In that case, I will get copies of the bid summation.

The chlorine equipment goes in the head house, $37,500. This consists of control panels and chlorination equipment for dispensing system.

Item two was chemical storage and speed equipment. This also went in the head house. The amount is $50,600. It is consisting of some storage tanks which are relatively immune to damage; and we have some dry and wet chemical feeding equipment which is very susceptible to damage, and a bunch of gears and flywheels and so forth.

Item three was fixing flocculation and sludge collection equipment in the amount of $79,000. A minor portion of that was two mixes which were installed in the head house. I would guess they had a value of $10,000.

Appendix D—Excerpts of the Transcript of Testimony of Edward Schumann

The major portion of the balance of the $69,000 was flocculation and sludge collection equipment and that was to be installed over here in the primary tanks and in the flocculation tanks. Those were tanks that I asked be made ready for us in my letter of May 29.

Once again at this point I emphasized at this point we had done nothing substantial on the job. This was our first structure that was available for us to go to work in that had anything of substance in it.

Item four was the filter bottoms, filter sand and gravel in the amount of $52,500. They are installed in the top floor of the filter building.

Item five is the pump and pumping equipment in the amount of $55,500. A minor portion of this was to be installed in the River Pumping Station, the old station, owned by the Authority. It was probably 15 years old and it was there at the time the contract was awarded. It was an old structure which we were to place two pumps into and a traveling screen.

It turned out it would have been--I am going to come to that later if it is agreeable. I would rather come back to it later if it is agreeable.

Mr. Lippe: All of these pumps are only a minor part?

The Witness: I would say 10 or $15,000 worth of pump station equipment.

Item six was iron pipe valve and sluice gates in the amount of $199,000 and there were very modest exceptions that all went in the filter pumping primary completion.

Appendix D—Excerpts of the Transcript of Testimony of Edward Schumann

Item seven was traveling water screen which was to be installed in the existing well water pump station.

Mr. Lippe: Where is this site?

The Witness: Off the site, five miles away on the river.

Mr. Lippe: All of this item seven is off the site?

The Witness: Yes. It was not a part of the arrangement at all.

Item eight was the plant instrumentation, butterfly valves and appurtenances. I would estimate that of the value two-thirds of it was installed in the filter house and one-third of it was installed in the head house.

Mr. Sohn: You didn't state this value.

The Witness: Oh, I am sorry, $183,000.

Mr. Orr: That refers to instruments?

The Witness: Item eight was butterfly values and gears.

Now, two-thirds of the value is in the filter building. This is my arbitrary guess. That is probably a bad word to use. One-third is in the head house.

That which went into the head house consisted essentially of very large control panel which had a value of approximately $50,000. It was susceptible to damage. It consisted of fiberglass and mass instrumentation and electric relays.

It was relatively simple to install as far as we were concerned but expensive. All we had to do was put it in place.

Appendix D—Excerpts of the Transcript of Testimony of Edward Schumann

Installation on the balance of items for material furnished the filter house represented a substantial part of the labor charge.

Item nine was exterior piping in the amount of $106,000. That concerned piping that was not in or under the various structures. It is commonly referred to as site piping.

I forgot, on May 29—as a consequence of the several job meetings we proceeded this date. I think I called your attention to it. We asked that the flocculation and sludge tanks be made ready for us and we would start work. We were told at the meeting on May 23rd—the Birmingham superintendent told us these tanks would be ready for us on the 12th of June; whereas we were able to set shafts and do a substantial amount of equipment setting in the period around July 8 through the 18th.

All right. We have had several meetings at this point and at this juncture we were optimistic that the job—we still thought it was possible and we wanted to refine the schedule so that we could give meaningful direction to our equipment deliveries. We had half a million dollars worth of machinery being held for us by several manufacturers, all who had been told to have it ready in the spring. We had given no releases and we were under constant pressure to ship; but we didn't have no place to ship.

Many vendors were demanding the price from us. Since we were not in a position to demand payment from the owner, we insisted that they hold it. This creates some problems as you probably know.

Appendix D—Excerpts of the Transcript of Testimony of Edward Schumann

Mr. Whitmore: You said this is your schedule?

The Witness: On the 27th day of May we communicated with the Engineer and said, it is time to refine the schedule, meaning the second schedule that you have there, the one on the right.

Mr. Whitmore: You haven't supplied any schedule—

The Witness: Yes. We have responded to this, but at this point we are trying to refine this schedule so we can tell these vendors when they are going to ship. That was the purpose. We wanted to roughset this equipment on May 29.

As a consequence of earlier conversations we were advised that the electrical contractor had no delivery date on the plant switch gear. Of course, without the switch gear, he couldn't do anything significant in terms of completing his wiring.

Mr. Lippe: May I ask: Why did that affect you?

• • •

By Mr. Downie:

Q. To carry that point one bit further: Is there a lot of labor time involved after the switch gear is delivered to get electricity into the plant so you in turn could do your hookup work? A. Yes.

The switch gear is the guts of the electrical contract, the whole power job. Until the switch gear is there, you are nowhere.

Mr. Lippe: May I ask one other question?

You mentioned refining of the schedules. Did you in fact have your own schedule?

Appendix D—Excerpts of the Transcript of Testimony of Edward Schumann

The Witness: We had an overlay right on top of that.

Mr. Lippe: Your Schedule 1 which is called the first schedule and what about the overlay for the second schedule?

The Witness: No. The first schedule got to be a concern to us right around this area. There was no point in our scheduling anything because the pricing of this equipment in the building, before it can begin, you first have to have a building. We had no building so we made no attempt to schedule anything because it had no meaning. What we did was ask for a building schedule so that we could do our scheduling. We can't survive in this atmosphere. We can't finish a job on November 1, 1968 if we haven't got a building for us to work in in May for us to put our equipment in.

The whole thing was meaningless.

When the second schedule came along, we asked the Engineer to refine and to fix dates so that we could schedule our machinery delivery—for example, at what point will the pump room floor be ready so we can set equipment there. There was no point for equipment to be there on September 1 if the slab wasn't going to be ready until the 1st of October. So, that was the thrust of it. The thrust of it all was to refine and establish some milestones.

Now, we have got a schedule with some meaning.

Let's do some refining to pull this together.

Mr. Lippe: Which schedule do you have?

Appendix D—Excerpts of the Transcript of Testimony of Edward Schumann

The Witness: I have it for both of them. At the bottom it doesn't have any meaning. It isn't subject to interpretation. It just lists items and projected dates based on this.

Mr. Lippe: As of what time?

The Witness: When I received the second schedule, a month or so went by. Then I said, now, let's refine this thing. Let's have the first elevation at this date; and let's have the second elevation at the date so we can make a meaningful schedule.

I wanted to know if this was going in the right direction.

Are we going to make it?

But, it still doesn't have enough detail to schedule on it.

Mr. McClain: Did this tie in directly with your dates, the shipping dates for equipment you mentioned prior to this?

The Witness: Yes.

For example, I point out on the control panel, it had a value of $50,000 and that went relatively high up in the head house. I think there were two or three elevations below it. There was no point in shipping the thing to the job site to get there on August 1 and then find out that the floor on which it was going to be placed wasn't going to be built until November or October.

This thing is as big as that wall over there and it costs $50,000. It weighed 20,000 pounds and we couldn't leave it out in the rain.

Appendix D—Excerpts of the Transcript of Testimony of Edward Schumann

By Mr. Downie:

Q. Was the Engineer aware of your scheduling, purchasing and shipping problems? A. Yes.

Mr. Sohn: Will you pause for one minute.

(Off the record.)

Mr. Sohn: Is 1:30 a suitable time?

We will recess until 1:30 for lunch.

Mr. McClain: May we ask how long we are prepared to go this afternoon? It will help our office commitments.

Mr. Sohn: How long can you hold on?

Mr. McClain: We will go to midnight if you people will.

Mr. Sohn: Well, we won't.

4:30 would be the latest but maybe some place in the middle of the afternoon.

Mr. McClain: And we can reconvene in the morning.

• • •

By Mr. Downie:

Q. What was the date of that? A. August 12.

Q. August 12? A. August 12.

We were able to start on October 15.

On August 16, the minutes indicated that the first floor deck in the head house would be poured on August 23 and I call your attention to the fact that the head house concrete was to have been completed in accordance with the second schedule by mid August.

Appendix D—Excerpts of the Transcript of Testimony of Edward Schumann

So the first floor deck was going in a week after all of the concrete in the building was to have been finished.

August 22, our daily diary indicates we have finally finished setting wall sleeves in the head house. At this juncture 10 months of the time had elapsed and had been used and we are just finishing the sleeve settings which should normally be done the first 60 days.

Q. Why couldn't you set them before that time?

* * *

Mr. McClain: Mr. Schumann, at that point had that sand envelope been provided for you in the original specifications of your original contract?

The Witness: No. This was extra work.

The Witness: Yes.

Mr. McClain: What was the cost of that to you?

The Witness: I estimated it to be $1,000.

Mr. McClain: This involves what, putting sand in the trenches around the pipe?

The Witness: I estimated that the extra cost for the jack hammering of the earth to be $1,000.

Yes, that was to keep it from freezing.

* * *

related it to this dollar amount; is that correct?

The Witness: Yes.

Mr. McClain: So, this is the ordinary business practice for you and it is an allocation of percentage?

The Witness: Yes. It is an attempt too. I think that says it.

Appendix D—Excerpts of the Transcript of Testimony of Edward Schumann

Mr. Whitmore: I personally would like to hear a breakdown of this because I think this is most significant.

Mr. Downie: Go ahead and give it.

The Witness: Should we continue with the explanation then?

Mr. Downie: Yes.

You can conclude by giving the gross sales for Remsco in '68.

The Witness: Our total annual overhead for the period ending November 30, 1968, $332,405.65.

Q. What is your overhead; what does that consist of? A. It is all items on the company books that are not direct labor and material charged to a job.

Q. Do you have an office in New Jersey? A. Yes.

Q. Office personnel? A. Yes.

Q. There is your salary and the salary of other management personnel? A. Yes.

Q. Draftsmen? A. Yes.

Q. And things of that nature? A. Yes, everything that constitutes the management that is not directly charged to a job.

Q. Therefore, you can take the annual overhead and divide by 365 and determine what the overhead per day is and multiply that by the fraction of $803,000 and divide by 3.5 million dollars, that represents overhead per day that might be reasonably charged to this job and that number works out to be $213 per diem? A. Yes.

Q. The overhead per day reasonably chargeable to this job? A. Yes.

Appendix D—Excerpts of the Transcript of Testimony of Edward Schumann

Now, I had this extended to a five digit number by calculating when I was in my motel room. I realized that this collection date was based on notes not to proceed, not the award. So, my arithmetic was only on 298 days instead of 365.

I have corrected it on the slide rule and my number is $213. It might be $214 or $212, give or take a dollar or two.

The job was to have been completed in 365 days; whereas it actually took 638. So, the job dragged on for an excess of 273 days.

> Mr. Whitmore: Was this 638 days the last part of this due to the malfunction of the BIF equipment?

• • •

APPENDIX E

Opinion of Judge Rowley Filed in the Beaver County Court of Common Pleas May 9, 1973

ROWLEY, *J.*

The defendant, Beaver Falls Municipal Authority, has presented a petition pursuant to § 11 of the Arbitration Act of 1927, Act of April 25, 1927, P. L. 381, No. 248, § 11, 5 P. S. § 171 (hereinafter referred to as the Arbitration Act) asking that the Court make an order modifying an arbitrators' award entered in favor of the plaintiff, Remsco Associates Incorporated. The plaintiff filed an answer to the defendant's petition and following the filing of written briefs and oral arguments by counsel, the matter is before us for disposition.

On September 28, 1967, the defendant, as owner, entered into a written contract with the plaintiff, as one of the prime contractors, for the mechanical work in connection with the construction of a water filtration plant. In addition to plaintiff's contract there was a General Contractor and four other prime contractors. Plaintiff's contract provided that all work was to be completed within 365 consecutive calendar days following receipt of written notice to proceed. The contract also provided that time in this regard was of the essence. The engineer on the project notified the plaintiff, in writing, to proceed with the work effective November 1, 1967. However, by reason of delays in the work, the project was not completed or plant operations commenced by the defendant until about May 14, 1969. The plaintiff thereafter presented a claim for additional expenses which it alleged were unnecessary and were caused by the failure of the defendant, as owner, to compel compliance by the general contractor and other

prime contractors with the time requirements of the contract. The matter was eventually submitted to a board of arbitration pursuant to paragraph 46 of the "general conditions" of the contract. After a number of hearings, at which evidence was presented by both parties, the Board, in a 2 to 1 decision, entered an award in favor of the plaintiff.[1] In its petition for modification, the defendant asks that the Court set aside the arbitrators' award in favor of the plaintiff for damages resulting from the delay in completion of the contract work.

Although paragraph 46 of the "general conditions" of the contract, which provides for arbitration, states that the award of the arbitrators "shall be final, binding and conclusive upon all parties without exception or appeal" both parties agree that the Arbitration Act is applicable and the Court may review the award in accordance with the terms of the Act. Section 16 of the Arbitration Act provides that it is applicable "to any written contract to which the Commonwealth of Pennsylvania, or any agency or subdivision thereof, or any municipal corporation or political division of the Commonwealth shall be a party." In *Acchione v. Commonwealth*, 347 Pa. 562 (1943) the Court held that § 16 of the Arbitration Act is mandatory and is a part of any contract to which the Commonwealth or any of its agencies is a party. The Court also held that this was so even though the contract itself provides that an

[1] All three arbitrators joined, however, in awarding the plaintiff interest on the final payment made by the defendant to the plaintiff under the contract. This award of interest has not been challenged by the defendant, either in its written brief or at oral argument.

arbitration award should be final and conclusive and specifically states that there shall be no right of appeal. Also see: *J. A. Robbins Company, Inc. v. Airportels, Inc.*, 418 Pa. 257 (1965); *Seaboard Surety Company v. Commonwealth*, 345 Pa. 147 (1942), and *Philadelphia Housing Authority v. Turner Construction Co.*, 343 Pa. 512 (1942).

The scope of our review is set out in § 11 of the Arbitration Act as follows:

> "In either of the following cases the Court shall make an order modifying or correcting the award upon the application of any party to the arbitration:
>
> • • •
>
> "(d) Where the award is against the law, and is such that had it been a verdict of the jury the Court would have entered different or other judgment notwithstanding the verdict.
>
> "The Court may modify and correct the award or submit the matter to the arbitrators."

In the case of *McDevitt v. McDevitt*, 365 Pa. 18 (1950), at page 21, the Court said:

> ". . . But in the present instance it seems to be agreed by both parties that the arbitration under the partnership agreement was to be governed by the Act of April 25, 1927, P. L. 381; that Act provides (section 11 (d)) that the Court shall modify or correct the award upon the application of any party to the arbitration where the award is against the law and is such that had it been a verdict of the jury the Court would have entered a different or other judgment notwithstanding the verdict; therefore mistakes of law, but *only* mistakes of law, may be rectified on appeal:"

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We are required to draw all inferences of fact in favor of the plaintiff since it has received the award of the arbitrators. *Pa. Tpk. Comm. v. Smith*, 350, 355 (1944).

The defendant's contention is that the contract between the parties provides the sole remedy available to the plaintiff for a delay in the work was an extension of time. This argument is based upon paragraph 39 of the "General Conditions" of the contract, which reads as follows:

> "If the Contractor is delayed at any time in the progress of the work by any of the following, the time of completion shall be extended for such reasonable time as the Engineer decides.
>
> "(a) By any act or neglect of the Owner or the Engineer or an employee of either.
>
> "(b) By any separate Contractor employed by the Owner.
>
> ". . .
>
> "No such extension shall be made for a delay occurring more than seven (7) days before claim therefor is made in writing to the Engineer."

The defendant cites the case of *Henry Shenk Co. v. Erie Co.*, 319 Pa. 100 (1935) in support of its contention. In that case the Court held that the plaintiff-contractor's sole remedy was an extension of time and he was not entitled to monetary damages for delay in completion of the contract. That contract contained a provision which was practically identical in all material respects with paragraphs 39 of the "General Conditions" in the contract now before us. In the *Shenk* Case the Court said, at pages 103-106:

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". . . in this State we have held that where there is doubt as to the interpretation or application of the provision of a contract with public authorities *'The contract will be interpreted in favor of the public:' Com. v. Nelson-Pedley Const. Co.*, 303 Pa. 174, 180. There are certain impediments to the contractual power of municipal officers which everyone who deals with them is bound to know and be governed by. When such officers do acts for which they as individuals may be personally liable, such acts, in determining whether liability is to be imposed on a municipality, are governed by different rules if done in furtherance of a governmental function by a government agent, or if the officer, in acting, is subservient to or controlled by a supervisory body such as a Court. (Emphasis supplied).

". . .

"The contract contained a provision relative to delays by the acts or neglect of the owner, architect, or other contractor or for any delays incident to the work. The rule relative to delays in the prosecution of work by an act or neglect of the owner, architect, or other contractors, or changes in the work and damages for wrongful acts of neglect has been thus stated. *In construction work, an owner does not generally guarantee or indemnify against loss occasioned by the delays of independent contractors connected with the work which may be reasonably anticipated.* The owner fulfills his duty when he selects as contractor a person generally known as responsible. Where contracts contain a provision against delay of other contractors or other incidents of the work, which provide in substance as this one does for no liability on the part of the owner for delays of contractors or changes in the work, such provision includes delays of other contractors in connection with the work, or delays which are covered by the contract or reasonably anticipated from the circumstances attending the project: Restatement of Contracts, section 315 (1) (b); see *Goss v. Northern*

Pac. Hosp. Assn., 50 Wash. 236; *Thompson v. St. Charles Co.*, 227 Mo. 220. *But such provisions have no reference to an affirmative or positive interference on the part of the owner or his representative apart from the contract, or ordinarily to a failure to act in some essential matter necessary to the prosecution of the work unless delay in performance is contemplated by the contract; these interferences or failures may cause damages in other ways than that contemplated by the provision against delays:* (Emphasis supplied.)

"Where a party under a delay and time extension provision on entering a contract foresees or should foresee that the work might be delayed by the failure of the owner or another contractor to perform, 'the remedy therefor . . . [is an] extension of time on the part of those who perform the work, and the presumption arises that this was intended to measure the rights of the contractor thereunder'.

"The general rule as to affirmative or positive acts is where they materially interfere with the forwardness of the work, or cause other damage, the owner is liable, or as to negative action where the execution of such contract is dependent upon something essential, whiel is to be performed by the owner, the default of the owner for an unreasonable time, resulting in damages to the contractor, may render the owner liable for such damages.

"While it is true the contract must be regarded as furnishing the exclusive measure of compensation for the work done or damages suffered, actual damages apart from it which result from the employer's acts or failures should not fall on the contractor. *It may be stated as a general rule that where an owner by an unwarranted positive act interferes with the execution of a contract, or where the owner unreasonably neglects to perform an essential element of the work in furtherance thereof, to the detriment of the contractor, he will be liable for the damages resulting therefrom.*" (Emphasis supplied.)

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In the *Shenk* Case the Court found that there were two distinct and separate categories of delay. In one, the delay was caused by the failure of other contractors on the job to perform and certain acts of the architect which delayed progress of the work. The other category of delay was that caused by the County Commissioners' failure to promptly let, and obtain Court approval, of contracts for other necessary portions of the work. The Supreme Court held that neither of these types of delay rendered the County liable. The Court pointed out that the County, as owner, had not taken any affirmative steps to cause the delay of the other contractors or the action of the architect. Likewise, in the case of *Emporium Area Joint School Authority v. Anundson C. B. S.*, 191 Pa. Super. Ct. 372 (1959), rev'd on other grounds, 402 Pa. 81 (1960), the Superior Court held that the Joint School Authority could not be held liable for delays in completion of construction, which delays were caused by actions of other contractors, the architect and the job inspector. We are of the opinion that the *Shenk* Case and the *Emporium* Case control the factual situation presented by the record in the case before us. Considering the record in the light most favorable to the plaintiff, it appears that the delay in completion of the work was due to the failure of the general contractor and the project engineer to promptly and efficiently schedule and coordinate the work of the various crafts and contractors so as to complete the work on time. It appeared that the job was shut down for some period of time during the winter months, although the plaintiff argues that the shut down by the general contractor was not necessitated by the weather conditions. In addition, the plaintiff also contends that at least one of the subcon-

tractors hired by the general contractor for some of the work was incompetent and failed to have a sufficient number of men on the job to promptly complete that portion of the work. These are the same kind of delays, however, which were encountered by the contractor in the *Shenk* Case and in the *Emporium* Case, *supra*. The delays of the general contractor and other independent contractors were of the type which may be reasonably anticipated by the parties to this lawsuit. The record does not disclose that the owner was guilty of any affirmative or positive interference with the plaintiff's work, nor does it disclose that the defendant-owner failed to perform in some essential matter anything which was necessary to the prosecution of the plaintiff's work. Therefore, the delays which the plaintiff complains of fall within the scope of paragraph 39 of the general conditions, set forth above, and limit the plaintiff's remedy to an extension of time to complete its own contract.

The plaintiff relies on the case of *Johnson v. Fenestra, Inc.*, 305 F. 2d. 179 (1962). That case involved a claim by a subcontractor against the prime contractor for damages resulting from a delay by the prime contractor in furnishing proper materials which were to be erected by the plaintiff-subcontractor. It is to be noted that the defendant in that case was not the owner, but was rather a prime contractor. The defendant in that case, not being a public authority, the rule that the contract must be interpreted in favor of the public does not apply. In addition, it appears from a reading of the opinion of the Court of Appeals that the contract in that case did not contain a provision for delay and extension as did the contract in the *Shenk* Case.

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Although not cited by counsel in this case, the Supreme Court considered this problem in *Gasparini Excavating Co. v. Pa. Tpk. Comm.*, 409 Pa. 465 (1963). In that case the arbitrators and the trial court refused the contractor's claim for damages said to have resulted from a delay in performance of the contract. Those decisions were based upon a provision in the contract which specifically provided that no damages would be allowed for such delays. The Supreme Court reversed and held that the contractor was entitled to damages. However, the Supreme Court, in its opinion, pointed out that the defendant-owner had actively interfered with the contractor's work by denying the contractor access to the work area which was occupied by another contractor at the time the defendant issued its order to proceed with the work. In the case before us there was no such active interference and at no time did the defendant-owner deny the plaintiff access to the work area. In its opinion, in the *Gasparini* Case, the Supreme Court characterized the conduct of the defendant-owner as coming within the exceptions pointed out in the *Shenk* Case where there has been an affirmative or positive interference by the owner apart from the contract or the failure to act in some essential matter which was necessary to complete the work properly. On the record before us, however, the conduct of the defendant-owner does not fall within either of those two exceptions.

The plaintiff argues, however, that coordination of the work between the various parties was critical to the time of completion and that time of completion was of the essence. (Paragraphs 28 General Conditions, and K-1c Special Requirements). The plaintiff further argues that

in spite of the necessity for coordination and cooperation, in order to complete the project on time, the defendant failed to take any action to enforce the various time limitations against the general contractor or other prime contractors. The plaintiff argues first, that under Paragraph 7 of the Special Conditions, the engineer had the right to order contractors to increase their efficiency and to expedite the work. However, it should be noted first that Paragraph 7 provides that "the engineer *may* order the contractors to increase their efficiency" but does not make it mandatory that he do so. The paragraph goes on to provide that "the failure of the engineer to demand such increase of efficiency, number or improvement shall not relieve the contractor of his obligation to secure the quality of the work and the rate of progress necessary to complete the work within the time required by this contract to the satisfaction of the engineer." Plaintiff also argues that under Paragraph 24 of the General Conditions, the engineer has the obligation to schedule and coordinate the work of the various contractors. However, Paragraph 24 merely provides that the engineer will observe the construction for the owner and shall decide all questions relating to amount, quality, acceptability and fitness of the work and materials. In addition, under Paragraph 28 of the General Conditions, the plaintiff is required to cooperate with other contractors on the job and fit his own work to the work of the other contractors on the job and fit his own work to the work of the other contracts as may be directed by the engineer. Thus, it would appear from the contract that the obligation to schedule and coordinate the work required cooperation between the various contractors on the job. Finally, the

plaintiff argues that the defendant had the right, under Paragraph 32 of the General Conditions, to terminate the employment of any contractor who failed "to prosecute the work . . . with such diligence as will insure its completion within the period herein specified . . ." However, the right of the owner to terminate a contract is optional and is not mandatory. The defendant cannot be faulted for failing to terminate the employment of the general contractor or any other contractor for it may well have been that such termination would have delayed the project even longer due to the necessity of obtaining a replacement.

For these reasons, we are of the opinion that the plaintiff's sole remedy under its contract with the defendant for the delays in construction encountered on this project was to obtain an extension of time. For this reason, we are of the opinion that the majority of the arbitrators made an error in law in awarding damages to the plaintiff.

For these reasons, we make the following

ORDER

Now, May 8, 1973, defendant's Petition to Modify the Arbitrators' Award is granted. The award of the Arbitrators is modified by striking therefrom the award of damages to the plaintiff, against the plaintiff, against the defendant, in the amount of Thirty-two Thousand ($32,000.00) Dollars for delay of construction.

BY THE COURT:
JAMES E. ROWLEY, *J.*